dant to study the Islamic religion and embrace Islam but she refused. The plaintiff, realizing that there was no chance of a reconciliation, divorced the defendant by pronouncing the Islamic formula of talak. The learned judge there realized that as the plaintiff had embraced Islam he at once became subject to Muslim personal and religious laws. But the more difficult question in such cases was what was the effect of the conversion on other persons who have some rights vested in them before the conversion. In that case the learned judge held that:

> On the one hand under the Muslim law, a Christian husband, on his conversion to Islam, is authorized to give talak to his Christian wife by pronouncing the formula of talak, but on the other hand, the courts in Pakistan cannot recognize such a talak in view of the provisions of the Divorce Act 1869 and other existing laws. In such a conflict of the personal law of the parties to the suit, there does not appear to be any justification to prefer the personal law of the plaintiff to the personal law of the respondent.

In our case here, the law applicable to the appellant had always been her own personal laws and the civil laws of the country. See also *Che Omar bin Che Soh* v *PP*.[2]

Since the appellant's marriage remained valid under the civil law at the time of the death of Visuvalingam s/o Ponniah, she is therefore a dependant under the pension laws and is entitled to a derivative pension.

The Pensions Act 1980 and the 1980 Regulations are civil laws of general application and if a person is entitled under the Act, that person is entitled, regardless of whether he is a Muslim or a non-Muslim. For the purpose of the pension laws, the appellant is certainly a widow (or one of the widows) of the deceased.

Mr Segara, Senior Federal Counsel, who appeared for the respondent had elected not to make any submission before us and relied solely on the decision of the learned trial judge.

We accordingly allowed the appeal and ordered that the appellant be entitled to the declarations sought. After hearing arguments on costs we decided not to make any order as to costs and that parties shall bear their own costs.

Appeal allowed.

Solicitors: *Chooi & Co.*

Reported by *Prof Ahmad Ibrahim*

Ooi Sim Yim v Public Prosecutor

SUPREME COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO 05-15-89
LEE HUN HOE CJ (BORNEO), MOHAMED AZMI AND AJAIB SINGH SCJJ
18 OCTOBER 1989

Criminal Procedure — Sentence — Charges under Firearms (Increased Penalties) Act 1971 for possession of firearm and under the Arms Act 1960 for possession of ammunition — Whether sentences should be consecutive or concurrent — Second charge subsidiary to first charge — Sentences should be concurrent — Whether judge of High Court can substitute judgment after it was recorded and delivered — Criminal Procedure Code (FMS Cap 6), ss 278, 282(d) & 292(i)

The appellant had pleaded guilty to two charges, the first for possession of a firearm and the second for possession of ammunition. The learned judicial commissioner sentenced the appellant to ten years' imprisonment and six strokes of whipping on the first charge and another three years on the second charge and ordered that 'both terms of imprisonment are to run consecutively from and be backdated to the date of his arrest'. [See [1989] 3 MLJ 120.] About two and a half months after the disposal of the case the learned judicial commissioner issued a corrigenda to substitute the original order with a new one which had the effect of making both sentences run consecutively, ie the appellant was to serve a total of 13 years' imprisonment to take effect from the date of his arrest. The appellant appealed against the said order, contending that the two sentences should run concurrently.

Held, allowing the appeal against consecutive imprisonment:

(1) Since both charges in this case had arisen out of one and the same transaction, it was not unreasonable to conclude that the second charge was really subsidiary to the first charge. Thus it was appropriate that the two sentences should run concurrently rather than consecutively.

(2) Section 278 of the Criminal Procedure Code (FMS Cap 6) did not empower the learned judicial commissioner to substitute his judgment two and a half months after it was recorded and delivered. As the judgment he gave was equivocal and capable of two interpretations, the basic principle of criminal justice should apply in that the construction more favourable to the appellant should be adopted rather than the substituted order subsequently made by the learned judicial commissioner.

Cases referred to

1 *Cheng Kee Huat & Anor* v *PP* [1948] MLJ 53 (follid)
2 *Hyder* v *Rex* [1949] MLJ 121 (follid)
3 *PP* v *Teh Ah Cheng* [1976] 2 MLJ 186 (follid)
4 *PP* v *Chung Kwong Huah* [1981] 1 MLJ 316 (follid)
5 *Lee Chow Meng* v *PP* [1976] 1 MLJ 287 (distd)
6 *PP* v *Heng You Nang* [1949] MLJ 285 (follid)
7 *In re Gibbons* 1LR 14 Cal 42 (follid)

Legislation referred to

Criminal Procedure Code (FMS Cap 6) ss 278, 282(d), 292(i)

Appeal from: Criminal Trial No 14 of 1984 (High Court, Kuala Lumpur)

Manjeet Singh Dhillon for the appellant.
Abdul Hamid bin Mohamad (Deputy Public Prosecutor) for the respondent.

Cur Adv Vult

Mohamed Azmi SCJ (delivering the judgment of the court): On 28 February 1989, the Kuala Lumpur High Court convicted the appellant on his plea of guilty on the following two charges under the firearms legislation:

First Charge

That you on 12 March 1984, at about 2.15am at the car park of Cave Disco, Jalan Ampang, in the Federal Territory of Kuala Lumpur was in unlawful possession of a firearm, to wit, a .38 Smith & Wesson Special revolver, bearing registration No 50886 Z, and that you have thereby committed an offence punishable under section 8 of the Firearms (Increased Penalties) Act 1971.

Second Charge

That you on 12 March 1984, at about 2.15am, at the car park of Cave Disco, Jalan Ampang, in the Federal Territory of Kuala Lumpur, did have in your possession 47 rounds of .38 ammunition, in circumstances which raise a reasonable presumption that the ammunition is likely to be used for any unlawful purpose and you have thereby committed an offence punishable under section 33 of the Arms Act 1960.

The offence in the first charge was punishable with imprisonment for a term which might extend to 14 years and with whipping of not less than six strokes, whilst the offence in the second charge carried a maximum imprisonment term of seven years or to a fine not exceeding $10,000 or to both, and should also be liable to whipping.

The deputy public prosecutor conducting the prosecution submitted the following facts of the case for the consideration of the learned judicial commissioner:

On 12 March 1984 at about 12.40am, acting on information received, a police party led by Inspector Henry Tan laid an ambush at the car park of the Cave Disco, Jalan Ampang, Kuala Lumpur.

At about 2.15am the same day, three male Chinese and one female Chinese were seen walking towards a BMW car bearing registration No WAN 5754 (wanted vehicle in connection with Setapak Report 1266/84). As soon as the four said persons approached the said car, the police party closed in and arrested them. They were then taken to the Jalan Bandar Police Station.

At the Jalan Bandar Police Station the said car was searched in the presence of the four said persons. During the search, Inspector Henry Tan found a .38 Smith & Wesson Special revolver loaded with six rounds of ammunition in its chamber from the glove compartment of the car. As soon as Inspector Henry Tan found the said revolver, one of the three said male Chinese (hereinafter called 'the accused') spontaneously admitted that the gun and the ammunition belonged to him personally and that he had placed it there prior to entering the Cave Disco. The accused further informed Inspector Henry Tan that there was a clutch bag under the front passenger seat containing more rounds of ammunition. Acting on the information, Inspector Henry Tan retrieved a clutch bag containing 41 rounds of .38 ammunition.

The said revolver and ammunition were subsequently sent to the armourer who examined them and found them to be serviceable.

The said revolver is the subject matter of the first charge and the 41 rounds of ammunition in the clutch bag together with the six rounds of ammunition loaded in the said revolver is the subject matter of the second charge.

The appellant was sentenced to ten years' imprisonment and six strokes of whipping on the first charge, and another three years on the second charge. In his judgment dated 28 February 1989, the learned judicial commissioner had ordered that:

Both terms of imprisonment are to run consecutively from and be backdated to the date of his arrest.

It was not seriously disputed that if both terms of imprisonment were to be backdated to 12 March 1984, ie the date of his arrest, then the sentences should be concurrent and not consecutive. If the order was meant to be consecutive from the date of arrest, then there was no necessity to mention about backdating the date from which the two sentences were to run. There was thus an ambiguity and material contradiction in the original order made by the learned judicial commissioner as to when the two terms of imprisonment were to take effect. As a result, about two and a half months after the disposal of the case, the learned judicial commissioner issued a 'corrigenda' signed by his secretary to substitute the original order with a new one, both as appearing in his notes of evidence and judgment, which had the effect of making both sentences run consecutively, ie the appellant was to serve a total term of 13 years' imprisonment to take effect from the date of his arrest. The appellant appealed against the said order, contending through his counsel that the learned judicial commissioner ought to have directed the two sentences to run concurrently, and that the court order as originally expressed was in fact an order for both sentences to be backdated to the date of his arrest and therefore he needed only to serve ten years and it ought not to have been substituted with another order to his detriment.

On the first issue as to whether the sentences of imprisonment should run concurrently or consecutively, the law could be found in s 282(d) and s 292(i) of the Criminal Procedure Code (FMS Cap 6). With regard to the sentence of imprisonment, s 282(d) provides:

Every sentence of imprisonment shall take effect from the date on which the same was passed unless the court passing such sentence otherwise directs.

Section 292(i) provides that a second or subsequent terms of imprisonment shall commence either immediately or at the expiration of the first term of imprisonment. The combined effect of these provisions is that unless the court imposing a sentence says anything to the contrary, the sentence runs from the date on which it was passed. If it is intended that it should run not from the date it was passed, but from the expiration of some other sentence, whether imposed by the same court at the same time or imposed by another court any time, then the court must

make an order accordingly. If this is done, it should be done in open court at the time the sentence is imposed, even though the concurrent sentence would have no effect on the length of sentence which the accused would have to serve. The exact words used are immaterial provided the judge's intention is clear.

In *Cheng Kee Huat & Anor* v *PP*,[1] the second appellant pleaded guilty and was sentenced to three years' imprisonment for importing opium and nine months' imprisonment for possession of opium in a motor car under the Opium and Candu Proclamation — the sentences to run consecutively. On appeal, Russell J held that the sentence in the second charge, being a subsidiary of the first charge, should run concurrently with the sentence of three years. In *Hyder* v *Rex*,[2] the appellant was convicted on two charges and was sentenced to six months imprisonment on each charge. On the record the sentences were consecutive, but in his grounds of judgment, the district judge ordered the two sentences to run concurrently. Gorden-Smith Ag CJ held that sentences should not be ordered to run consecutively unless there were some good grounds to so doing.

In his grounds of judgment, the learned judicial commissioner had quoted and relied heavily on a number of local authorities in which the High Court had rightly expressed disgust against any crime involving firearms. In *PP* v *Teh Ah Cheng*,[3] the appellant was bound over under s 294 of the Criminal Procedure Code by the special sessions court after he had pleaded guilty to two charges of unlawful possession of an automatic pistol and six rounds of ammunition under s 9(a) of the Firearms Act 1960. On appeal by the public prosecutor, Abdoolcader J (as he then was) enhanced the sentence to three years' imprisonment on each charge, the sentences to run concurrently. Again, in *PP* v *Chung Kwong Huah*[4] the accused as in the present appeal pleaded guilty to two charges under the firearms legislation and was also sentenced to ten years' imprisonment and six strokes for being in an unlawful possession of a revolver, and to three years' imprisonment for being in unlawful possession of ammunition. Although the accused had a previous conviction, Chan J ordered the sentences to run concurrently. However, in *Lee Chow Meng* v *PP*,[5] where the accused was convicted for armed robbery committed with others still at large, under ss 392 and 397 of the Penal Code (FMS Cap 45), Abdul Hamid J (as he then was) held on appeal that in the circumstances of the case it was appropriate for the imprisonment sentence to be made consecutively with two other sentences imposed under the firearms legislation.

From these cases, a distinction appeared to have been made in assessing sentences between offences involving mere unlawful possession of firearms which by definition includes ammunition, and those involving such unlawful possession plus the use of such firearms. A severe sentence was considered necessary in the public interest in cases where the perpetrators of the crime had used the lethal weapons against their victims. From these authorities and without minimizing the gravity of the offences, we fully agreed that a distinction must be drawn in assessing sentence under the firearms legislation where violence was used or threatened, and cases involving mere unlawful possession without actual user or threat. Secondly, where one charge was a mere subsidiary of another charge, the sentences imposed should be concurrent unless there existed some reasonable grounds for directing otherwise.

In this appeal, the facts were more similar to the case of *Chung Kwong Huah*[4] in that the charges consisted of mere unlawful possession, and therefore the imprisonment sentences should run concurrently in the absence of enhancing factors, and also in view of the adequacy of the sentence imposed on one of the charges. As an additional mitigating factor, the appellant had no previous conviction, although the bullets found in the motor car were 47 rounds including those loaded in the revolver. As regards the argument that the appellant had co-operated with the police fully, such co-operation when given in the circumstances of the present case could be due to a desire to tell the whole truth for the sake of the three innocent friends who might otherwise be unnecessarily implicated in the crime. As such, it would not be wrong to treat such co-operation as a neutral factor. However, since both charges had arisen out of one and the same transaction, it was not unreasonable to conclude that the second charge was really subsidiary to the first charge. Thus, on the authorities relied upon by the learned judicial commissioner himself, it was appropriate that the two sentences should run concurrently rather than consecutively. In our view, the gravity of the two offences was sufficiently reflected by the ten-year imprisonment term and six strokes of whipping imposed in the principal charge against a first offender who had pleaded guilty.

The other issue raised the question of whether the learned judicial commissioner could lawfully substitute his judgment about two and a half months after the case had been disposed of. Although the point was not raised in argument, we were of the view that s 278 of the Criminal Procedure Code (FMS Cap 6) was relevant for consideration. Section 278 provides:

> No court, other than a High Court, having once recorded his judgment, shall alter or review the same: provided that a clerical error may be rectified at any time, and that any other mistake may be rectified at any time before the court rises for the day.

From the provision of s 278, all courts could rectify a clerical error at any time before or after judgment had been recorded; other mistakes must be rectified at any time before the court rose for the day. But the question was, to what extent the words 'other than the High Court' in s 278 conferred the High Court with the power to alter

or review its judgment once it had been recorded and delivered?

In *Mallal's Criminal Procedure* (4th Ed) at p 415, the following commentary appears:

> *Alteration or review of judgment*
>
> Under sub-s (2) of this section all courts can rectify clerical errors and other mistakes before the court rises for the day. Specific power, however, has been given to the High Court to alter or review its judgment after it has been recorded. The power conferred on the High Court under sub-s (1) of this section appears to be in any event co-extensive with the limited power of a judge in civil litigation to recall his judgment before the order is perfected: *In re Harrison's Share under a Settlement* [1955] Ch 260 (CA).
>
> An oral judgment can be altered before it is recorded and sealed; it is open to the High Court to review or alter its judgment after it has been recorded and a writ issued in pursuance thereof; nevertheless this power should be exercised very sparingly. It should be exercised only where there is an error apparent on the face of the record or an obvious mistake about the facts which, if not corrected, would lead to miscarriage of justice: *State of Bombay* v *Geoffrey Mariners & Co* AIR 1951 Bom 49.
>
> Spenser Wilkinson J in *PP* v *Heng You Nang* [1949] MLJ 285 held that neither the subordinate court nor the judge on appeal from such court could alter a judgment once it is pronounced and signed: *Goh Ah San* v *R* [1938] MLJ 95 distinguished.

In *PP* v *Heng You Nang*,[6] Spenser Wilkinson J at p 288 expressed the opinion that s 278 conferred no jurisdiction upon the High Court, and he cited the following passage from the judgment of Petheram CJ in the Indian case of *In re Gibbon*:[7]

> In my opinion the effect of the words 'other than a High Court' is precisely the same as if in place of them the legislature had at the end of the section added these words 'this section does not apply to the High Court'. There is no substantive enactment in that section with reference to the High Court, and all it does is to reserve the powers which existed in the High Court before, so that they are in no degree taken away. What the powers of the High Court were before it is unnecessary to consider, but whatever they were, they were reserved and they were in the same position after this section was passed as they had been in before; and inasmuch as it is not shown to us that, before the passing of this section, any power of revision existed in the High Court, that section did not, in my opinion, create any such power, and therefore it appears that this section does not help the applicant.

In this appeal we held the view that s 278 of the Criminal Procedure Code did not empower the learned judicial commissioner to substitute his judgment two and a half months after it was recorded and delivered. The so-called error in this case consisted of a material ambiguity in the judgment as to whether the two sentences imposed should run concurrently or consecutively. The judgment being equivocal and capable of two interpretations, the basic principle of criminal justice should apply in that the construction more favourable to the appellant should be adopted rather than the substituted order subsequently made by the learned judicial commissioner. Our task was made easier in this appeal because the nature and circumstances of the case made it very appropriate for the two sentences to run concurrently.

In the event, we allowed the appeal against the consecutive sentence, and ordered that the three-year sentence on the second charge should run concurrently with the ten-year term imposed on the first charge, and that both terms of imprisonment should take effect from 12 March 1984 — the date of arrest. We must, however, affirm the minimum order of six strokes whipping on the first charge.

Appeal allowed in part.

Solicitors: *Lawrence Dhillon & Associates.*

Reported by *Prof Ahmad Ibrahim*

American Express Sdn Bhd v Dato Wong Kee Tat & Ors

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 609 OF 1987
LEE HUN HOE CJ (BORNEO), HARUN HASHIM AND MOHAMED YUSOFF SCJJ
14 OCTOBER 1989

Revenue Law — Exchange control — Loan by bank in Singapore to Singapore company — Personal guarantees given by directors who are Malaysians — Deposit of shares of Malaysian company as pledge — Default in payment of loan — Claim against guarantors — Whether guarantees contravene exchange control law and are void, illegal and unenforceable — Counterclaim that shares were sold negligently — Exchange Control Act 1953, ss 4, 9, 36 & Fourth Schedule para 4(1)

Banking — Guarantee — Loan by bank in Singapore to Singapore company — Personal guarantees given by directors who are Malaysians — Deposit of shares of company as pledge — Whether guarantees contravene exchange control legislation and are void, illegal and unenforceable

Civil Procedure — Summary judgment — Application for — Facts clear and undisputed — Issue raised pure question of law — Judge should decide on question of law — Rules of the High Court 1980, O 14 & O 33

In this case the appellants, a bank incorporated in the United States of America with a place of business in Singapore and resident outside the Scheduled Territories as defined by the Exchange Control Act 1953, had lent money to a Singapore company, Votier, of which the respondents were directors and shareholders. It was agreed that the respondents as directors were to give personal guarantees for the repayment of the loan for amounts specified in the agreement and that certain shares of a Malaysian company be pledged to the appellant.

The Singapore company defaulted in payment of the debt and the appellants sold the shares of the Malaysian company.